No. [redacted]
192

In the

Supreme Court of the United States

OCTOBER TERM 1963

FRANK W. CASS AND ROBERT W. STRAUSS,
Petitioners,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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WARLICK PRESS INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

No.

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FRANK W. CASS AND ROBERT W. STRAUSS,
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v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner Frank W. Cass prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals (set out Appendix A, infra) is reported at 329 F. 2d 106.

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 20, 1964. A Petition for Rehearing was denied on May 11, 1964. The jurisdiction of the Court is invoked under 28 U.S.C. §1254 (1).

RULE INVOLVED

Federal Rule of Civil Procedure 60(b):

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill

of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a hearing on the merits, and the use of discovery in preparation therefor, of a timely motion for relief filed in the Federal District Court pursuant to Rule 60(b) which alleges, among other matters, that respondent in the previous federal suit knowingly misrepresented the amount of an alleged indebtedness and prevented the petitioner from ascertaining the true amount due.

2. Whether a state court order authorizing the state court receiver to compromise an interpleader suit in Federal Court precludes the Federal Court from granting relief under Rule 60(b) from the Federal judgment.

STATEMENT

Petitioner, on August 22, 1962, filed a timely Motion for Relief from Final Judgment under Rule 60(b). (R. 161-166). The judgment from which relief was sought was entered February 26, 1962. (R. 158-161). The basis of the Motion was fraud and misrepresentation. The federal district court without holding a hearing on the merits or permitting Petitioner to use the federal rules of discovery dismissed the motion without prejudice to the petitioner to seek relief from the federal judgment in state court. (R. 247). The Court of Appeals affirmed apparently on two grounds, that the motion failed to state a basis for relief and that the state court order authorizing the receiver to compromise the feder-

al interpleader suit precluded Petitioner from obtaining relief from the federal judgment.

The Rule 60(b) Petition for Relief (set out Appendix B, *infra*) among other things, alleged in reference to the federal interpleader suit that Respondent Youngstown's federal complaint asserted a debt owing of some $73,000 plus interest (R. 160-163) that Respondent immediately prior to the judgment represented to the Court and to the parties that a valid indebtedness existed to the extent of $83,000 plus (R. 163); that a note March 19, 1958, of $35,000 was fully paid and discharged (R. 163-164); that Respondent represented a claim of $30,000 plus was due and owing on such note (R. 163-164); that additional credits of $25,000 or more were not allowed by Respondent (R. 164); that Youngstown received a payment excess of $70,000 over which they were entitled (R. 164); that the Petitioner Frank W. Cass was unaware at the time of the alleged compromise and hearing in Federal Court of the false and incorrect representations by Youngstown (R. 164-165); that through the conduct of Respondent and others that the Petitioner was prevented from learning the true nature and extent of the indebtedness (R. 165).

The original judgment from which relief was sought under Rule 60(b) stemmed from a consolidation of two civil actions. On September 14, 1960, the Respondent filed suit against the Petitioner, Frank Cass, in his individual and partnership capacity. (Thunderbird Drilling Company), and the State Court receiver of the partnership, and others, seeking some $73,451.56 on various indebtednesses allegedly owed. On April 12, 1960, Phillips Petroleum Company filed an inter-

pleader action in the District of Oklahoma, Such action was transferred to the Northern District of Texas, and then consolidated with the suit filed by the Respondent. On November 21, 1961 the *state* court entered an order authorizing the state court receiver (Strauss) to settle the claim of the Respondent against the partnership. (R. 199-201) On December 22, 1961, the Federal District Court, per Judge Davidson, entered an Order disbursing the funds (approximately $85,000) which had been paid into the registry of the Court. (R. 149-150). The Petitioner, Frank W. Cass, filed a Motion for Rehearing as to the order entered on December 22, because he assertedly was not given notice and opportunity to attend the hearing. (R. 149-150). The Respondent then stated all claims asserted by them had been fully paid and compromised, requested the Court to dismiss such actions. (R. 156-157). The district court on February 5, 1962, granted the Respondent's Motion. Thereafter, the district court (per Judge Davidson) entered the judgment (R. 159-161) complained of by the instant Motion under Rule 60(b).

On August 29, 1962, in connection with the instant 60(b) Motion for Relief, the Petitioner filed pursuant to interrogatories sought information regarding payment and credits on the aforementioned notes. The Respondent refused to file any answer to the Request for Interrogatories, and accordingly the Petitioner filed a Motion for Default Judgment under Rule 37(d). (R. 177). In the alternative, the Petitioner requested the District Court under Rule 37(a) to direct the Respondent to answer the interrogatories. (R. 180-181). Thereafter, the Respondent filed a Motion to

quash the Petitioner's Rule 60(b) Motion and to strike the Interrogatories. (R. 187-196). At the hearing in open court on the foregoing Motions (R. 224-234) inquiry was made as to whether the State Court receiver of the Thunderbird Drilling Company, a co-partnership consisting of Robert B. Payne and Frank W. Cass (Petitioner), joined in Petitioner's Motion for Relief under Rule 60(b).

The Court concluded that the Receiver did not support the Rule 60(b) motion (R. 233) and entered an order on February 8, 1963, overruling the motion of the Petitioner and granting the motions of the Respondent. (R. 234-235). Immediately thereafter, on February 8, 1963, the Petitioner Cass, formally joined by the Receiver, filed a motion for new trial (rehearing). Nevertheless the district court entered an order on April 18, 1963, denying the rehearing (R. 248). The court (Judge Davidson) expressly noted that that the motion for relief under 60(b) was denied *not* because of absence of *fraud*, but because the error, if any, had been committed in *state court:*

"THE COURT:

"Gentlemen, it behooves every court to correct the errors that were committed in his court, regardless of whether the errors were traceable to the litigants, or clients or to the court itself.

"The question that suggests itself to us is, these errors were not committed in the Federal Court. All that the Federal Court did was to pay out some money that had been paid into this court, so that we never conducted a trial.

"The attorneys for the parties came up here with an agreed judgment based upon the litigation that

had taken place in the State Court, and we ordered the money disbursed in accordance with that judgment. If error has been committed by the Court in fixing the amount of money that the different parties should recover. We will dismiss the motion without prejudice to its being urged in the State Court." (R. 247).

Thus, Petitioner was completely denied the right of discovery and an opportunity to prove the merit of their Rule 60(b) motion. The Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I The Judgment Below Raises Important Questions Regarding Federal Rule 60(b) Which Should Be Determined by this Court.

A. Introduction

This Court has not expressly spoken on what constitutes a basis for relief under 60(b)(3), on whether the general principles of pleading apply to Rule 60(b) motions, nor on whether the moving party is entitled to utilize the federal rules of discovery to establish fraud or misrepresentation.

The holdings of the district court and Court of Appeals by lightly brushing aside Petitioner's motion without a hearing on the merits and without permitting the use discovery emasculate Rule 60(b) from being an effective rule. Whether Rule 60(b) should be an ineffective rule to be entertained at a court's discretion or a vital rule giving parties enforceable rights is a matter that this Court should determine. Judge Wham in recent article entitled "*Federal District Court Rule*

60(b): A Humane Rule Gone Wrong", 49 A.B.A.J. 566 (1963) observed:

> "Among the many technical rules of civil procedure for the United States District Courts, Rule 60(b) stands alone as a bright ray of hope for parties who have had a final judgment entered against them, often without a hearing on the merits."
>
> * * *
>
> "We suggest that it may be fairly concluded that the intent in adopting Rule 60(b) was to avoid the technicalities surrounding the 'ancient' common law and equitable remedies, but that some courts have mistakenly adopted a rule of strict construction contrary to the intent of the authors of this 'humane' rule."

B. Basis For Relief Under Rule 60(b)(3)

The Court of Appeals' opinion states that Petitioner's motion for relief "merely asserted that he had some proof that the alleged debt was in part paid, and that Appellee knew of this when it obtained the order in the State Court for settlement of the debt." The motion stated far more (See statement, *supra* and motion which is set out Appendix B, *infra*). The motion did not allege *extrinsic* fraud, but certainly constituted a fair pleading of misrepresentation. Although this Court has not stated what elements are necessary for relief under 60(b)(3), Professor Moore in his treatise states:

> "In addition to fraud, 60(b)(3) includes 'misrepresentation, or other misconduct of an adverse party.' Because Rule 60(b) is remedial and to be construed liberally, and because of the comprehensive sweep of 60(b)(3) any fraud, misrepresentation, circumvention or

> other wrongful act of a party in obtaining a judgment so that it is inequitable for him to retain the benefit thereof, constitute grounds for relief within the intendment of 60(b)(3)." (Citing cases). *Moore's Federal Practice*, ¶60.24[5].

Particularly apropos to the issue at bar is the observation of the Second Circuit in *Market v. Swift and Co., Inc.*, 173, F. 2d 517, 518 (1949) concerning Rule 60(b)(1):

> ". . . though the case has been shunted back and forth between trial and appellate court, it has not yet progressed beyond an excise in pleading necessities. Modern impatience with procedural formalities suggests the probable improductiveness of such a cause, which we must now understand by our holding that Plaintiff cannot properly be denied opportunity to present the case they believe they have."

Under general principles of pleading the Petitioner's motion was sufficient to state a basis for relief under 60(b) as Moore interprets the Rule. With reference to pleading this Court observed in *Conley v. Gibson*, 355 U.S. 41, 47:

> ". . . the Federal Rules of Civil Procedure do not require a claimant to set out in detail the fact upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claims that will give the Defendant fair notice of what the Plaintiff's claim is and the grounds upon which it rests."

Even Federal Rule 9 regarding the pleading of fraud with particularity is not construed by the lower courts to require pleading of evidence where the opposing party can prepare an adequate answer. See, e.g., *United States v. Son-*

stein, 27 F.R.D. 285 (E.D. Pa. 1961). The Federal Rules do not expressly state that a motion under 60(b) must meet a more rigid standard than that required by Rules 8 and 9.

C. Right of Discovery Under 60(b) Motions

In the case at bar, Petitioner did not receive a hearing on the merits of his motion. The hearing was on whether the motion should be quashed and the interrogatories struck or whether the Court should order the Respondent to answer the interrogatories. Respondent's motions were granted, the Petitioner's denied.

Such action was *not* based upon Rule 30(b), (Orders for the Protection of Parties and Deponents), nor upon grounds that the interrogatories were beyond the scope of Rule 33. The ruling below can be sustained only if *no right of discovery exists under Rule 60(b) motions.* This question is resolved seemingly by the express provisions of the Federal Rules. Rule 1 provides:

> "*Rule 1. Scope of Rules.* These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 81 does *not* except proceedings filed pursuant to Rule 60(b). There is, though, no authoritative decision by this Court regarding the right of discovery under 60(b) motions.

The importance of discovery in cases of fraud and misrepresentation can *not* be over emphasized. Fraud is easy to allege, but difficult to prove. To hamstring the protesting party by denying him discovery would guarantee the defeat of his motion. Since the Supreme Court's landmark decision in *Hickman v. Taylor*, 329 U.S. 495, no informed Federal practitioner has seriously doubted the Federal views on full and fair disclosure of relevant facts by use of discovery.

> "[T]he deposit in discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."
>
> 327 U.S. at 507.

See also, Judge Joe E. Estes' paper on discovery in the *Seminar on Procedure for Effective Judicial Administration*, 29 F.R.D. 191, 280-299 (1961).

Indeed, Federal appellate courts have upheld the sanction of default judgment for the willful failure to answer interrogatories. See, *e.g.*, *United States v. 42 Jars*, 264 F. 2d 666 (3rd Cir. 1959); *Brookdale Mill, Inc. v. Rowley*, 218 F. 2d 728 (6th Cir. 1954); *Milewski v. Schneider Transportation Co.*, 238 F. 2d 397 (6th Cir. 1956); *United States v. 3963 Bottles*, 265 F. 2d 332 (7th Cir. 1959). Petitioner contends that Rules of discovery fully apply to 60(b) motions.

II. The judgment below in holding that relief from the federal court judgment could not be obtained because a state court order conflicts with rationale of decisions by this Court.

The 60(b) motion sought relief from a federal judgment in a federal interpleader suit that awarded Respondent some $80,000 plus. The district court ruled:

> "The question that suggests itself to us is, these errors were not committed in the Federal Court. All that the Federal Court did was to pay out some money that had been paid into this court, so we never conducted a trial.
>
> "The attorneys for the parties came up here with an agreed judgment based upon the litigation that had taken place in the State Court, and we ordered the money disbursed in accordance with that judgment. If error has been committed by the Court in fixing the amount of money that the different parties should recover. We will dismiss the motion without prejudice to its being urged in the State Court." (R. 247).

The Court of Appeals affirmed on the basis that the Rule 60(b) motion was a "collateral attack." The state court order authorized the state court receiver to compromise the suit in federal court. The receiver possessed such power under *Texas Civil Statute, Art.* 2297. The additional effect of the state court order would be to prevent a surcharge against the receiver. The state court order was *not* a final judgment awarding property in the *custody* of the receiver to the Respondent. (compare, e.g., *Fagan and Osgood v. Boyer Ice Machine Co.*, 65 Tex. 424). Indeed, the Respondent was not even a party to the state court order. The

state order was not pled as res judicata in the federal suit and indeed could not have been so urged. The state court order was wholly immaterial to the power of the federal district court to render its judgment. Moreover, since the state court receiver formally joined the Petitioner with seeking relief under 60(b) from the federal judgment and are not concerned with federal interference in a state court receivership proceeding.

This Court has just recently considered the relationship between state and federal courts regarding the power of a state court to restrict the right to litigate in a federal forum. *Donovan et al v. Dallas* U.S. (No. 264, Oct. Term 1963), 32 U.S.L.W. 4491. From the opinions cited therein, it would seem clear: (1) that the Petitioner cannot obtain any relief from the federal interpleader suit judgment in the state court; and (2) that a state court order authorizes a receiver to compromise a claim forming the basis of a federal suit cannot preclude the federal court from giving relief under 60(b) from the federal judgment. Concurrent jurisdiction occasionally produces an intertwining of federal-state orders. In the case at bar this relationship resulted in the Respondent obtaining the money in federal court without a trial on the validity of such claim. As Judge Davidson stated: "All that the federal court did was to pay out some money that had been paid into this court, *so we never conducted a trial.* (R. 247). (Emphasis added.) Respondent now urges as a result of such state and federal court orders that the Petitioner is not entitled to relief from the federal judgment in federal court. This Court should

make it clear that state court orders do not preclude a federal court from entertaining on the merits a 60(b) motion.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner,
Frank W. Cass.

CERTIFICATE OF SERVICE

This is to certify that pursuant to Supreme Court Rule 33(3) a copy of this Petition for Certiorari has been duly mailed to John L. Roach, Republic National Bank Building, Dallas, Texas, counsel for Respondent.

.....

William VanDercreek

APPENDICES

Appendix A — The Opinion of the United States Court of Appeals. A1 - A4

Appendix B — Petitioner's Rule 60(b) Motion for Relief. B1 - B6

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20592

FRANK W. CASS AND ROBERT W. STRAUSS,
Appellants,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(March 20, 1964.)

Before TUTTLE, Chief Judge, and HUTCHESON and GEWIN, Circuit Judges.

HUTCHESON, Circuit Judge: Appellants assert that the district court erred in denying Cass the right to discovery under Rule 33, F.R.C.P., pursuant to his motion under Rule 60(b) F.R.C.P. to set aside a final judgment because of fraud.

Appellant Cass and Robert B. Payne, d/b/a Thunderbird Drilling Company, a partnership, became indebted to Youngstown. Cass and Payne argued, Cass sued Payne in the District Court of Dallas County, Texas, and Robert S. Strauss was appointed receiver of Thunderbird. Youngstown filed suit in the United States District Court for the Northern District of Texas against Cass, Payne, Thunderbird, Strauss and other persons asserting liens against the property which was subject to the lien of Youngstown.

An interpleader suit was filed in the United States District Court for the Northern District of Oklahoma by Phillips Petroleum Company, who produced oil from the property in question. This action was transferred to the Northern District of Texas, where Youngstown had filed its suit and was consolidated with that suit.

Phillips paid $89,624.52 into the registry of the court. A compromise was effected between Youngstown and Cass with respect to the debt alleged owing. The State court authorized Receiver Strauss to settle with Youngstown both the debt claim and the actions pending in the United States District Court for the Northern District of Texas.

At the hearing on the application of Strauss, Receiver, the United States District Court ordered the $83,242.05 which the State Court had ordered paid to Youngstown in settlement of its claim, so paid. No appeal was taken from this judgment, and six months later appellants filed a motion for rehearing to have set aside the judgment of the District Court denying the 60(b) motion on the ground of fraud.

The fraud claim contained no allegations of fact constituting fraud but merely an allegation that the debt that was compromised was not, as to a part of it, due.

Cass's Rule 60(b) motion and his companion motion under Rule 33 for discovery were both denied on the grounds that "This whole proceeding seems to go into that which is too remote and without sufficient grounds to justify a rehearing". A second motion, joined in by the receiver, was then made. This motion was in the form of a motion for new trial based on the court's denial of the Rule 60(b) and Rule 33 motions. This motion was denied on the ground that no ground for relief was stated, that if there was any error in the earlier court judgment, it was not made in the federal court but rather in the state court, that is that the judgment of the federal court was based upon an order of settlement issued by and out of the state court, and the errors, if any, occurred not in the federal court but in the state court, and the motion under Rule 60(b) was in effect a collateral attack upon a state court order.

We think it clear that the motions were properly denied and that appellants are entitled to no relief from the order denying them. Appellant Cass merely asserted that he had some proof that the alleged debt was in part paid, and that appellee knew of this when it obtained the order in the state court for settlement of the debt. This is not an allegation of fraud in obtaining the federal court judgment, particularly since the al-

leged debt was in part paid, appellee knew of this when the debt was settled, and the alleged debt was greatly in excess of the amount of the settlement.

The relief from the orders appealed from is DENIED, and the orders are AFFIRMED.

APPENDIX B

MOTION FOR RELIEF FROM FINAL JUDGMENT UNDER RULE 60 (b)

(Numbers and Title Omitted) (Filed August 22, 1962)

Comes now the Defendant Frank W. Cass for relief pursuant to Federal Rule of Civil Procedure 60(b) and states:

I.

This Honorable Court by Order entered December 22, 1961, directed among other things, that Youngstown Sheet and Tube Company be paid from monies deposited in Court by Phillips Petroleum Company the sum of $78,809.73 and the sum of $4,432,32, which total of $83,242.05 was to be in full payment of the claims of Youngstown Sheet and Tube Company against the Thunderbird Drilling Company, a co-partnership of the Defendant Frank W. Cass and Robert B. Payne; the Order is attached as Exhibit A and made a part of this motion.

II.

This Honorable Court by its Judgment entered February 26, 1962 affirmed its Order of December 22, 1961 that the payment of $83,242.05 would be in full settlement and discharge of the claims by Youngstown Sheet and Tube Company. The Judgment of the Court is final and attached as Exhibit B and made a part of this motion.

III.

Youngstown Sheet and Tube Company by its original complaint filed in this Court, Civil Action No. 8581, alleged that one Robert B. Payne, individually and in behalf of the co-partnership firm of Thunderbird Drilling Company had executed four notes to wit:

(a) Notes dated April 31, 1957, in principal sum of $90,000.00;

(b) Note dated May 31, 1957, in principal sum of $47,995.87;

(c) Note dated September 30, 1957, in the principal sum of $16,770.00;

(d) Note dated March 19, 1958, in the principal sum of $33,936.05,

which notes were attached on Exhibits A through D to Youngstown's complaint. It was also alleged that the co-partnership Thunderbird Drilling Company was indebted to Youngstown on an open account for the sum of $3,229.32. Youngstown further alleged that there was due and owing at the time of filing its complaint:

(1) $19,158.00 principal on the note dated May 31, 1957;

(2) $16,770.00 principal on the note dated September 30, 1957;

(3) $30,149.39 principal on the note dated March 19, 1958;

(4) $4,144.00 accrued interest to September 1, 1960 on the note dated May 19, 1958;

(5) $3,229.32 on the open account;

and that the total amount then due and owing was $73,451.56.

IV.

Youngstown Sheet and Tube Company filed a petition for intervention on April 8, 1960, in the 160th District Court of the State of Texas in which it alleged the total amount then due and owing was $70,708.25.

V.

Youngstown Sheet and Tube Company further represented to this Honorable Court and to the parties to such proceedings that a valid indebtedness existed between itself and the co-partnership Thunderbird Drilling Company in the amount of $83,242.05 as of December 22, 1960; and the Youngstown Sheet and Tube Company thereby received by Order of this Honorable Court the sum of $83,242.05 in payment in full of its claims.

VI.

On the date of this Honorable Court's Order and also on the date of this Court's Judgment a valid indebtedness of $83,242.05 did not exist between Youngstown Sheet and Tube Company and the co-partnership of Thunderbird Drilling Company. The note dated March 19, 1958, in its principal sum of $35,936.05 which Youngstown alleged $30,149.39 principal was due and owing, was fully paid and discharged and a full release had been given by Continental Emsco Company, a division of Youngstown Sheet and Tube Company. Other payments to Continental-Emsco and or Youngstown Sheet and Tube Company by or in behalf of Thunderbird

Drilling Company were not credited against the alleged indebtedness. In addition various property of fair value of approximately $25,000.00 or more belonging to Thunderbird Drilling Company was wrongfully converted and sold by Continental-Emsco Company (Youngstown) for which no proper credit was made on the alleged indebtedness to Youngstown Sheet and Tube Company.

VII.

As a result of the foregoing facts set forth in Paragraph VI above, Youngstown Sheet and Tube Company received an overpayment in excess of $70,000.00. Youngstown Sheet and Tube Company knew that it was not entitled to receive this sum of $83,242.05 from the registry of this Honorable Court but received such amount through fraud as herein set out.

VIII.

As stated in this Honorable Court's Judgment Order (Exhibit B), there is now pending in the 160th District Court of the State of Texas a receivership action to Defendant Frank W. Cass, the Thunderbird Drilling Company and others. By Order of such State District Court all discovery has been frozen and the Defendant, Frank W. Cass was unaware of the fraud in procuring the Judgment in this Honorable Court at the time such Judgment was entered or within the time to file a motion for new trial. The Defendant Frank W. Cass, individually, and through his attorneys, has requested from Continental-Emsco and also from

Robert S. Strauss, Receiver appointed by the State Court and Defendant herein, full and complete accounts of the sum owed and paid Continental Emsco but has not been furnished with same.

IX.

Through the conduct of Continental-Emsco (Youngstown Sheet and Tube Company) and Robert B. Payne, the Defendant Frank W. Cass was and is prevented from learning the true nature and extent of the indebtedness by Thunderbird Drilling Company to Youngstown Sheet and Tube Company. The Defendant Robert B. Payne has in his custody and control certain books, records and accounts which are relevant to the activities of Thunderbird Drilling Company but has and still refuses to permit the Defendant Frank W. Cass to examine such books and records.

X.

The Judgment of this Honorable Court if not vacated and modified prevents other creditors of the Thunderbird Drilling Company co-partnership from receiving their share, if any, of the proceeds made into the registry of this Court; and also prevents any recovery on behalf of the Thunderbird Drilling Company from Youngstown Sheet and Tube Company even though a substantial overpayment be proved.

WHEREFORE, Defendant Frank W. Cass prays the Judgment of this Honorable Court of February 23, 1962 in the instant cause be vacated and set aside and that the Youngstown Sheet and Tube Company be directed and

required to return all monies over which it was not entitled together with interest thereupon and that Defendant Frank W. Cass have such further relief that is equitable and just.

Respectfully submitted,

WOODGATE & RICHARDS

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[Note: Exhibits A and B to Motion, R. 166-171, omitted]

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In the

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FRANK W. CASS AND
ROBERT W. STRAUSS,
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v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 1230

In the

Supreme Court of the United States

FRANK W. CASS AND
ROBERT W. STRAUSS,

Petitioners,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This brief is submitted on behalf of Respondent, The Youngstown Sheet and Tube Company, in opposition to the petition for writ of certiorari.

OPINION

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 329 F.2d 106. Such opinion is copied as Appendix A to the petition for writ of certiorari.

STATEMENT

The opinion of the Court of Appeals fairly states the case. However, the petition contains certain misstatements of the case and of the record herein, and there are certain salient facts to which we wish to direct the attention of the Court.

(1) Respondent contradicts the statement of Petitioner that he was denied or deprived of a hearing on the merits of his motion made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and that the only matter heard was the motion of Respondent to strike the motion of Petitioner and to strike the interrogatories filed by Petitioner.

The record reflects that the motion of Petitioner was called and heard on February 7, 1963. (Tr. 224-235) The order entered thereon expressly states that there "came on to be heard * * * (a) the motion of Frank W. Cass, filed herein on August 22, 1962, that there be vacated and set aside certain orders and the final judgment heretofore entered herein * * *" and such order expressly states that the Court heard and considered such motion (Tr. 234). The record further reflects that:

> (a) Petitioner never suggested prior to the writ of certiorari (and particularly he did not suggest to the District Judge) that he was denied or deprived of a hearing on his motion. On the contrary, he has stated that his motion was heard (Tr. 238), he filed a motion to "re-hear" such motion, and he has stated that his "motion for new trial" to re-hear his motion under Rule 60(b) was heard (Page 4 of Appellants' Brief in the Court of Appeals).
>
> (b) Petitioner has *never* offered or tendered one iota of evidence in support of his motion and has *never* sug-

gested that any evidence offered or tendered by him was rejected or that he was denied the opportunity to tender such evidence.

(2) Respondent contradicts the statement of Petitioner on page 3 of the petition that the motion of Petitioner was dismissed "without prejudice to the Petitioner to seek relief from the federal judgment in the state court". The order contains no statement of such import and states merely that the motion was overruled. (Tr. 234). The order overruling Petitioner's "motion for new trial" (to rehear his motion under Rule 60(b)) states simply that such motion "is in all respects denied". (Tr. 248) Neither order contains any reference to any other court.

(3) The Statement of Petitioner that Respondent was paid from the registry of the District Court a portion of the funds deposited therein without a trial on the validity of the claim of Respondent to such funds does not sufficiently state the extent and nature of the proceedings in the District Court. The record reflects that:

(a) such funds remained so deposited for almost two years;

(b) all parties were before the court and had fully pleaded;

(c) the payments made (including the payment to Respondent) from the registry were the result of a compromise and settlement between Respondent and the receiver vested with exclusive custody of those assets and affairs of Petitioner here involved; (Tr. 199)

(d) such settlement was fully heard and considered by the state court vested with jurisdiction of such as-

sets and affairs of Petitioner and in which such receiver was appointed; (Tr. 199)

(e) such compromise and settlement was in open court presented to the United States District Judge, upon application of such receiver, for approval, and such funds were distributed pursuant thereto; and

(f) the subject actions were called for trial in their regular order on the docket, after notice to all parties, and Petitioner was present in court upon the call of such cases. (Tr. 158)

(4) Although the petition has incorrectly been styled "Frank W. Cass and Robert W. Strauss, Petitioners, v. The Youngstown Sheet and Tube Company, Respondent", the text thereof (see page 1 of the petition) and the signatures to such petition reflect that such writ is sought solely by Frank W. Cass.

ARGUMENT

1. An examination of the petition, of the opinion of the Court of Appeals, and of the record herein reflects that this case involves only procedural points and does not meet the requirements of Rule 19 of this Court.

2. Prior to the filing of the motion under Rule 60(b) Petitioner had already had his "day in court" on the precise, identical matters he sought to have heard further in connection with such motion. The only matters alleged in his motion (which referred to the validity of the debt owed Respondent) were alleged by him in and were the subject of four separate suits extending over a period of years. (In the interest of brevity and to avoid repetition, a detailed discussion of such prior proceedings is not set forth here. We

respectfully refer the Court to pages 2 through 7 and 28 through 31 of the brief of Appellee in the Court of Appeals.) The "discovery" he now says he was denied was available to him on such identical matters and issues in each of such suits for a period of years, and he studiously avoided the opportunity of having the same heard or of seeking discovery. Proof by Petitioner of every contention urged by him subsequent to the final judgment in the District Court would not entitle him to relief under Rule 60(b), since each of the same had previously been urged and he had had every opportunity for discovery prior to such judgment.

Further proceedings or hearings on such matter are expressly precluded by the principle of cases such as *Toledo Scale Company v. Computing Scale Company*, 261 U.S. 399. In a virtually identical situation Justice Taft stated:

> "* * *After all parties have had a full and fair opportunity to prepare their cases (the Court will refuse) to permit them to drag out litigation by bringing in new evidence which, with due diligence, they ought to have discovered before the hearing* * *"

See also *Doudy v. Haufield*, 189 F.2d 637; *A.T. & S.F. Ry. v. Barrett*, 246 F.2d 846; *Ira S. Bushey & Sons v. W. E. Hedger Transp. Corp.*, 167 F.2d 9; and *Stiers v. Martin*, 277 F.2d 737.

3. The only reason urged by Petitioner for relief under Rule 60 (b) was his baseless suggestion that the debt sued for by Respondent was not due. (Tr. 163-165). An allegation that a Plaintiff accepted payment of a sum less than the amount for which such party had sued, in spite of a con-

tention of one party that the debt was not due, does not constitute an allegation of "fraud" within the contemplation of Rule 60(b). See *Toledo Scale Company v. Computing Scale Company*, supra, by this Court, where it was stated that a plea that a suit was "prosecuted by an unscrupulous competitor, conscious all the time of its falsity and injustice" was not a plea of "fraud" sufficient to set aside the judgment, and *England v. Doyle*, 281 F.2d 304, where it was stated that failure to disclose to the district judge that the bankruptcy court had already taken a particular action did not constitute "fraud" within Rule 60(b), since the "fraud" must consist of an "unconscionable plan or scheme" which improperly influenced the court.

In support of his contention that his motion sufficiently alleged "fraud", Petitioner, on page 9 of his brief, refers to and quotes from *Market v. Swift and Co., Inc.*, 173 F.2d 517. The quoted language is taken entirely out of context and does not appear in any portion of the opinion concerning itself with Rule 60(b). The quoted language appears in the first, opening paragraph of the opinion, and the Court did not say, as suggested by Petitioner, that the appellant in that case was entitled to further proceedings under Rule 60(b). The Court pointed out that Rule 60 had been included in the "telescoping" provisions of the prayer and it was not necessary to even consider such Rule.

Whether or not a particular debt is due is the ultimate issue for determination in virtually every case instituted in courts of civil jurisdiction. If the Court holds that a mere

allegation that the debt disposed of or resolved was not due constitutes an allegation of "fraud" within the contemplation of such Rule, the Court will have held that every party to every suit for debt and money judgment can attack the judgment under Rule 60(b) and seek additional discovery, after a full trial and final judgment, on the mere hope or dream of finding something new. Thus, *no* suit for debt will ever be disposed of until there has been held a full trial and, in addition, a full re-trial and exploration under the guise of such Rule.

4. The relief contemplated by Rule 60(b) is extraordinary and may be invoked only upon a showing of exceptional circumstances. The Rule cannot be substituted for appeal or other process for relief which a party chooses not to take. It is not intended as a means to provide relief from an alleged error of the district court. *Flett v. W. A. Alexander & Co.*, 302 F.2d 321, certiorari denied, 371 U.S. 841; *Title v. U.S.*, 263 F.2d 28, certiorari denied, 359 U.S. 989, rehearing denied, 360 U.S. 914. No such circumstances exist herein. Petitioner had many opportunities and other avenues to pursue prior to the filing of the subject motion by which he could have had determined the validity of Respondent's claim or by which he could have had corrected any error allegedly committed. The record reflects that he pursued various courses designed solely to prevent a final judgment.

5. Motions pursuant to Rule 60(b) lie entirely within the province of the discretion of the District Judge. Such rule contains no mandatory provisions. It states only that the

trial court *may* set aside his prior actions. *Johnson v. Masonic Bldg. Co.*, 138 F.2d 817, certiorari denied, 321 U.S. 780. It has been consistently held that the actions of the District Judge in such matters are normally beyond appellate review. See, e. g., *Flett v. W. A. Alexander & Co.*, supra; *Title v. U.S.*, supra; *Securities and Exchange Commission v. Farm and Home Agency, Inc.*, 270 F.2d 891, certiorari denied, 362 U.S. 903; *Cole v. Fairview Development*, 226 F.2d 175, certiorari denied, 350 U.S. 995; *Johnson v. Masonic Building Company*, supra; *Nederlandsche Handel—Maatschappij, N.V. v. Jay Emm, Inc.*, 301 F.2d 114; *Fulenwider v. Wheeler*, 262 F.2d 97; and *Seismograph Service Corporation v. Offshore Raydist, Inc.*, 263 F.2d 5. Such discretion is essential to prevent harrassment and the useless prolongation of litigation over matters that have been concluded. Particularly will the judgment of the appellate court not be substituted for the discretion of the trial court where the motion under Rule 60(b) is heard by the same judge who heard, and is familiar with, prior proceedings in the case. *A.T. & S.F. Ry. v. Barrett*, supra.

The hearing of motions made pursuant to Rule 60(b) on the motions and arguments, without additional evidence, is proper and not unusual, and lies within such discretion of the trial court. See *Securities and Exchange Commission v. Farm & Home Agency, Inc.*, supra, where the appeal was from an order denying a motion for leave to file a motion under Rule 60(b), and *Cole v. Fairview Development*, su-

pra, where, as in the instant case, the complaining party had settled a case and then changed counsel, who sought to undo the acts of his predecessor.

Such discretion was in no way abused in this action. At the time the settlement was made and effected the consolidated cases had been pending almost two years. The trial court had the benefit of the entire record and the pleadings (including those pleadings raising the same issues in various instances over such period). *No* evidence was offered and *no* suggestion was made that Petitioner desired to present any evidence. The action of the District Judge was the only possible action to be taken on the motions.

6. This petition for writ of certiorari has been sought solely by Frank W. Cass.

The record reflects that prior to the institution of these actions a receiver was appointed by the state court "to take charge of the business properties, assets, books and records of the partnership of Payne and Cass, Cass and Payne and or Thunderbird Drilling Company", including the subject properties and debt. (Tr. 197). The record further reflects that such appointment is still in force and effect and such receiver is still functioning in such capacity. (See, e.g., page 2 of Appellant's brief in the Court of Appeals).

Under the law of the State of Texas such receiver was and is possessed with the exclusive control and custody of the assets and affairs of the partnership. Article 2297, Revised Civil Statutes of Texas. This principle has been consistently conceded by Petitioner. All parties to the state

court action, including Petitioner (upon whose application the receiver had been appointed) were bound by the actions of such Receiver taken pursuant to the order of the state court. *Spence v. State National Bank of El Paso*, 5 S.W.2d 754; *Eaton v. Whisenant*, 50 S.W.2d 1109; *Scott v. Farmers & Merchants National Bank*, 97 Tex. 31, 75 S.W. 7, Davis v. Mitchell, 225 S.W. 1117; and *T. & P. R.R. Co. v. Griffin*, 76 Tex. 441, 13 S.W. 471, affirmed, 151 U.S. 105.

If these actions in the United States District Court had been solely between Respondent and such Receiver, Petitioner would have been bound by any action therein, including a final judgment or compromise. Such receiver was the only person vested with authority to settle the subject dispute on behalf of the partnership and the joinder of Petitioner therein or his consent thereto was not and is not required. Petitioner did not possess the power to present a motion to set aside the act of such receiver and the receiver did not move to set the same aside. Petitioner does not now possess the power to take any action in connection with such debt, such funds, or such settlement, including the petition to this court. The sole person vested with such power has not petitioned this court for writ of certiorari and has not sought to appeal or otherwise set aside the action of the Court of Appeals.

7. The Court of Appeals did not hold or suggest, as is erroneously stated by Petitioner, that discovery is not available in connection with an motion made pursuant to Rule 60(b). Such Court merely held that the discovery sought

by Petitioner in connection with this motion was not available to him because his pleadings and the record did not justify it.

8. The petition for writ of certiorari is frivolous, does not meet the requirements of Rule 19 of this Court, and is wholly without merit. As has been true of most of the actions of Petitioner in this litigation since its inception, such petition has been filed solely to defer the full and final conclusion of this litigation and to harass, inconvenience, and create expense for Respondent. As is reflected by the record and the opinion of the Court of Appeals, Respondent accepted in settlement of its claim an amount substantially less than the amount sued for and due. Pursuant to Rule 56 of this Court, appropriate damages should be awarded to Respondent to compensate it for its additional expenses in connection herewith.

WHEREFORE, Respondent prays that the petition for writ of certiorari be denied, that this litigation be fully and finally concluded, and that it be awarded damages as provided by Rule 56 of this Court.

Respectfully submitted,

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A copy of the foregoing brief in opposition was on this 15th day of July, 1964, mailed to:

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No. 194

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Supreme Court of the United States

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v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

This Court, on Octob : 12, 1964, denied the Petition for Writ of Certiorari. Pursuant to Supreme Court Rule 58.2, Petitioner Frank W. Cass prays that a Petition for Rehearing be granted and that this Court grant certiorari and vacate the judgment below and remand the case for further proceedings in view of the subsequent decision by the court below in *In Re Casco Chemical Co.*, 335 F. 2d 645 (5th Cir. 1964).

GROUNDS FOR REHEARING

Subsequent to the filing of the Petition for Certiorari and the Brief in Opposition, the Fifth Circuit opinion in *In Re Casco Chemical Co.*, 335 F. 2d 645 (1964) was reported. For reasons that follow it is submitted such decision is in conflict with the instant case. The Petition for Rehearing is limited to this issue. Although a conflict *within* a circuit is ordinarily not a basis for this Court to grant certiorari, where the conflict occurred subsequent to the filing for certiorari this Court has granted rehearing and remanded the cause back to the court of appeals for determination. Such procedure would be necessary as it is doubtful whether the Court of Appeals at this date would have jurisdiction to otherwise entertain a Petition for Rehearing.

In *United States Ex Rel. Robinson v. Johnson, Warden*, 316 U.S. 649, this Court held:

> "*Per Curiam:* The motion for leave to file a second petition for rehearing is granted. The second petition for rehearing is granted. The order denying certiorari, 314 U. S. 675, is vacated, and the petition for writ of certiorari is granted. The motion for leave to proceed *in forma pauperis* is also granted. In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (See *Robinson v. Johnston*, 118 F. 2d 998, 1001, and *Crockett v. United States*, 125 F. 2d 547, 548, 549), and in view of this Court's decision in *Waley v. Johnston*, ante, p. 101, reversing 124 F. 2d 587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including leave to petitioner to apply for a hearing before the court *en banc*. See *Textile Mills Corp. v. Commissioner*, 314 U. S. 326."

In other instances, this Court has determined the matter without remanding. See Stern & Gressman, Supreme Court Practice (3rd Ed. 1962) p. 130.

BASIS OF CONFLICT

In the case at bar Petitioner filed a motion for relief under Rule 60(b) from a final judgment that had awarded the Respondent some $80,000. Petitioner also sought discovery. The federal district court, however, granted Respondent's motion to quash Petitioner's Rule 60(b) Motion, and Respondent's motion to strike Petitioner's Rule 33 Interrogatories. The motion of Petitioner for default judgment under Rule 37(d) for willful failure to answer the interrogatories and in the alternative to direct Respondent under Rule 37(a) to answer the interrogatories were denied. The district court quashed the 60(b) Motion and struck the discovery because the state court receiver of the Petitioner's partnership had not joined in the 60(b) Motion and then after formal joinder by the receiver denied relief because the fraud if any had been committed in state court. On Appeal, Petitioner pointed out the state court hearing merely authorized and directed the receiver to settle the federal court suit and that Respondent's claim was not liquidated in state court. (Respondent was not a party to the state proceeding.) And of course, no relief from the final federal court judgment regular on its face could be obtained in state court. Petition appeal was predicated on (1) the *60(b) Motion stated a valid claim on which relief could be granted* and (2) *that a party to Rule 60(b) Motion is en-*

titled to use the federal rule of discovery in preparation of his case. The Fifth Circuit ruled against the petitioner and affirmed. (See full statement of case in Petition for Certiorari):

The subsequent decision of the Fifth Circuit in *In Re Casco*, 335 F. 2d 645 (1964), appears to be *contra*. Therein the Fifth Circuit was concerned with "an independent proceeding brought under Rule 60(b)" more than one year after the judgment had become final. To decide the limitations issue it was necessary for the court to consider the legal sufficiency of the complaint—the identical issue to the case at bar. The Fifth Circuit also fully recognized that the moving party would have the right to use the federal rules of discovery.

Although the two cases are not identical in context, it is respectfully submitted that no *substantial* basis of distinction exists.

The Fifth Circuit in *In re Casco* ruled, in relevant part:

> "In view of the action of the District Court, see note, 51, supra, we have at this stage a single, simple question. That question is whether the one-year limitation in F. R. Civ. P. 60(b)(1), (2), (3) likewise bars an independent action. And yet the parties insist on arguing, briefing and re-briefing at length a number of matters not yet present, and in no way yet determined by the District Court.
>
> "At the outset, before discussing these extraneous matters, we think that in testing its legal sufficiency under the test articulated in *Conley v. Gibson*, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80; *Arthur H. Richland Co. v. Harper*, 5 Cir., 1962, 302 F. 2d 324, it

is too early to read the complaint as though it is confined to grounds (1), (2), and (3) of rule 60(b). If there are uncertainties from these general allegations, there are ample means within the arsenal of pre-trial discovery, interrogatories, requests for admission, depositions, and the like, to ascertain just what is charged, especially under the broad language of "other good and sufficient reasons * * * justifying relief from the operation of said judgment" which might well encompass grounds (4) and (6).[18]"

"[18] In the process of this exploration, it should be kept in mind that rule 60(b) is to be given liberal construction. United States v. Gould, 5 Cir. 1962, 301 F. 2d 353; Michigan Surety Co. v. Service Machinery Corp., 5 Cir. 1960, 277 F. 2d 531; Serio v. Badger Mut. Ins. Co., 5 Cir., 1959, 266 F. 2d 418, cert. denied; 361 U. S. 832, 80 S. Ct. 81, 4 L. Ed. 2d 73; 3 Barron & Holtzoff Sec. 1332 n. 9 (Wright Supp. 1963).

"Ground (6) is, and is meant to be, flexible, and in its operative application relief may be broadened by virtue of grounds (1), (2), (3). See, e.g., Gros Inc. v. W E. Grace Mfg. Co., 5 Cir. 1963, 320 F. 2d 594 (bringing intrinsic as well as extrinsic fraud within (6); 3 Barron & Holtzoff Sec. 1326 n. 64 1 Sec. 1329 nn. 72.7, 72.9 (Wright Supp. 1963)." 335 F. 2d 645, 650-651.

Although the Fifth Circuit now acknowledges that Rule 60(b) covers both extrinsic and intrinsic fraud (see their fn. 18, *supra*), the Respondent in the Fifth Circuit and in this Court relied on cases that were decided prior to adoption of Rule 60(b) and at which time extrinsic fraud was required (see, e.g. Brief in Opposition, p. 5).

In the case at bar, no trial between the Petitioner and the Respondent occurred in the state court hearing authorizing the receiver to settle; no trial on the merits occurred in federal court suit that awarded Respondent some $85,000 (Petitioner-Cass requested a continuance to obtain an attorney which was denied. Cass' attorney did not appear at the

final hearing because allegedly his life and the life of his family had been threatened. See affidavit of Petitioner Cass in Appendix A to Response of Appellant-Petitioner on Petition for Rehearing before the Fifth Circuit. Tr. ...); and no hearing in the district court below was held other than on the right of discovery and Respondent's motion to quash the 60(b) Motion. Of course, although Respondent effectively opposed all discovery, Respondent's counsel has argued again that no fraud, etc. was committed. (See, e.g. Brief in Opposition, p. 5) In spite of such assurance Petitioner would like to avail himself of discovery and then obtain a hearing on the merits of his 60(b) Motion. Under the subsequent decision by the court below in *In re Casco*, 335 F. 2d 645, Petitioner would be afforded such rights: "If there are uncertainties from these general allegations, there are ample means within the arsenal of pre-trial discovery, interrogatories, requests for admission, depositions, and the like, to ascertain just what is charged * * *" 335 F. 2d at 650. Petitioner's Rule 60(b) motion (set out appendix B to Petition for Certiorari) alleged far more than, as characterized by the Fifth Circuit, that the Respondent was "merely" over-paid and certainly contained more substantial allegations than the Fifth Circuit held to be sufficient in *In re Casco, supra.*

CONCLUSION

Because of the subsequent decision of the Fifth Circuit, it is respectfully requested that this Court grant the Pe-

tition for Rehearing and in reference to the Petition for Writ of Certiorari, such further orders as are appropriate.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, William VanDercreek, a member of the bar of this Court, certify that the foregoing Petition for Rehearing from the order of this Court denying the Petition for Writ of Certiorari is filed in accordance with Supreme Court Rule 58.2 and is presented in good faith and not for delay, and is restricted to the effect of the subsequent decision by the Fifth Circuit in *In Re Casco*, 355 F. 2d 645 (1964).

WILLIAM VANDERCREEK

CERTIFICATE OF SERVICE

This is to certify that pursuant to Supreme Court Rule 33.3(b) a copy of the foregoing Petition for Rehearing has been duly mailed to William J. Harnisch and John L. Roach, attorneys for Respondent.

WILLIAM VANDERCREEK